IN THE COURT OF APPEALS OF IOWA

No. 2-813 / 12-0889
Filed January 24, 2013

OTTUMWA MANUFACTURING d/b/a CADBURY SCHWEPPES HOLDING, INC.,
Petitioner-Appellant/Cross-Appellee,

vs.

CARL BOYD SR.,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Cadbury Schweppes Holding, Inc. appeals, and Carly Boyd Sr. cross-appeals, the judicial review ruling that affirmed the workers' compensation commissioner's award of workers' compensation benefits to Boyd. **AFFIRMED ON BOTH APPEALS.**

Steven T. Durick and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellant.

Gary G. Mattson of LaMarca & Landry, P.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Cadbury Schweppes Holding, Inc. (Cadbury Schweppes) appeals, and Carly Boyd Sr. cross-appeals, the judicial review ruling that affirmed the workers' compensation commissioner's award of benefits to Boyd. Cadbury Schweppes contends the evidence does not support the commissioner's finding that Boyd suffered a whole-body injury extending to the right hip and award of eighty-percent industrial disability. Boyd contends he is entitled to a permanent total disability award.

We find substantial evidence supports the agency's finding that Boyd suffered an injury to the body as a whole. We further find the evidence supports the award of eighty-percent industrial disability. Although Boyd's treating physicians did not assign work restrictions as a result of his injuries, Boyd suffered a substantial loss of earning capacity as a result. However, because he is able to perform some sedentary work, an award of permanent total disability is not appropriate. We affirm.

I. Background Facts and Proceedings.

Boyd was an employee of Cadbury Schweppes on August 22, 2008, when a fork truck ran over his feet. He sustained crush injuries to both feet as a result. There is no dispute regarding these foot injuries.

At the time of the work injury, Boyd was wearing a brace on his right ankle for a twisted ankle he'd suffered in January 2008. Boyd had also suffered a right-foot fracture in 1989. His left foot sustained a hairline fracture and a dislocated toe in a 2004 injury.

Boyd began receiving treatment from podiatrist Dr. Scott King, three days after he was injured. Dr. King noted bruising and swelling to both feet and heels. Although the swelling decreased, the bruising did not. An MRI revealed a bony contusion of the metatarsal joints. In December 2008, Dr. King noted continued swelling and discoloration. Although Boyd claims to have suffered and reported hip pain since being injured, Dr. King noted Boyd's complaint of right-hip pain for the first time in March 2009. Dr. King associated Boyd's complaints of hip pain with the work injury and imposed restrictions. Later, Dr. King signed a letter deferring to Boyd's other physicians with respect to work restrictions and the cause of his hip injury.

Boyd also received treatment from Dr. Kenneth Pollack, a pain management specialist. Boyd complained of pain in his low back and right hip. Dr. Pollack theorized this pain was likely caused by altered body mechanics stemming from the crush injury. In March of 2009, Dr. Pollack opined his belief "within a reasonable degree of probability" that Boyd's left knee and right hip pain "is a direct result of the work-related injury." This opinion was based on the fact Boyd had no symptoms of right hip or left knee pain prior to the work injury. However, in January 2010, Dr. Pollack signed a letter which states, in pertinent part, that he was "unable to state, with a reasonable degree of medical certainty that Carl Boyd's right hip complaints . . . were a result of the August 22, 2008 alleged work injury."

Dr. Nettrour, a hip specialist, examined Boyd. On November 2, 2009, he wrote the following impression of Boyd: "Right hip injury, etiology unclear." He

later signed a letter stating that Boyd has suffered no identifiable hip injury, and that any hip pain could not be related to the work injury.

Dr. Friedgood, a neurologist, also examined Boyd and concluded he did not need any permanent work restrictions based on his alleged right hip injury.

On November 16, 2009, Boyd was given an independent medical examination by Dr. Stoken, who related his complaints of pain in both feet, his right hip, and low back to the work injury. The doctor found Boyd had reached maximum medical improvement on September 21, 2009. Dr. Stoken assigned Boyd impairment ratings to the body as a whole: five percent based on the sacroiliac joint dysfunction and lumbar injury, ten present for the right lower extremity injury, and fifteen percent for the left lower extremity for a total impairment of twenty-eight percent of the whole body. Dr. Stoken assigned permanent work restrictions, including avoiding prolonged standing and walking; walking on uneven ground; and repetitive bending, twisting, and lifting.

On November 20, 2009, Boyd was examined by Dr. Eric Barp at the defendant's request. Dr. Barp opined that Boyd was likely at maximum medical improvement. He restricted Boyd's work to "[s]it down: work only." In another document dated the same day, Dr. Barp wrote, "May return to work without restrictions from a foot and ankle standpoint." Dr. Barp later explained that the document assigning restrictions was issued in error. He assigned Boyd impairment ratings of four percent to the body as a whole, ten percent to the lower extremity, and fourteen percent to the foot.

Boyd filed a petition for arbitration alleging leg and hip injuries. Following a hearing, the deputy commissioner issued an arbitration decision, finding Boyd's injury extended beyond the lower extremities and into his right hip. The deputy commissioner concluded Boyd suffered an eighty-percent industrial disability.

The employer appealed the arbitration decision, arguing the agency erred regarding the findings of a hip injury and permanent disability. On appeal, Boyd argued that he should have been award total permanent disability. The workers' compensation commissioner affirmed the arbitration decision.

The employer filed a petition for judicial review, arguing the commissioner's finding of a whole-body injury extending to the right hip was not supported by substantial evidence and was based upon an irrational, illogical, or wholly unjustifiable application of law to fact. It also argued that an award of eighty-percent industrial disability is unsupported by the evidence. Boyd cross-appealed, arguing the eighty-percent industrial disability award is not supported by the evidence and, instead, seeking an award of total disability. The district court rejected the claims of both parties and affirmed the commissioner.

II. Scope and Standard of Review.

The Iowa Administrative Procedure Act sets forth the standards of judicial review which we apply in our review of workers' compensation decisions. *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 199 (Iowa 2010). Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). Where the agency has been clearly vested with

the authority to make fact findings on an issue, we cannot disturb those findings unless they are not supported by substantial evidence in the record before the court when that court reviewed the record as a whole. *Id.* If the agency has been clearly vested with the authority to make factual determination, it follows that application of the law to those facts is likewise vested by a provision of law within the agency's discretion. *Id.* In those cases, we only disturb the agency's application of the law to the facts if that application is irrational, illogical, or wholly unjustifiable. *Id.*

Cadbury Schweppes contends the workers' compensation commissioner's findings are unsupported by substantial evidence. We may reverse, modify, or grant other relief if the agency action is based on fact determinations "not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f) (2011); *Bell Bros.*, 779 N.W.2d at 199. Substantial evidence is defined as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

When reviewing a fact finding for substantial evidence, we judge the finding "in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it." Iowa Code § 17A.19(10)(f)(3); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Evidence is not

insubstantial merely because different conclusions may be drawn from it. *Pease*, 807 N.W.2d at 845. Our task is not to determine whether the evidence supports a different finding, but rather whether it supports the findings actually made. *Id.*

Both Cadbury Schweppes and Boyd contend the commissioner erred in applying the law to the facts of the case. In such instances, our review is under the "irrational, illogical, and wholly unjustifiable" standard. *Larson Mfg. Co, Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Under this standard, we allocate some deference to the commissioner's determinations, but less than we give to the agency's fact findings. *Id.*

III. Analysis.

Cadbury Schweppes first contends the commissioner erred in determining Boyd sustained a whole body injury rather than a scheduled injury to the bilateral lower extremities. It argues there is insubstantial evidence to support the agency's finding that Boyd suffered a permanent injury to his hip.

In finding Boyd suffered an industrial disability the arbitration decision notes Dr. Pollack's inconsistent statements. In March 2009, Dr. Pollack stated:

> Mr. Boyd provides no history of pain related to the right hip or left knee prior to his work injury of August 22, 2008. He has had continuous pain in these areas since. There is no contradictory information which I have seen in outside medical records. I therefore believe within a reasonable degree of probability that his left knee and right hip pain is a direct result of the work-related injury.

However, in January 2010 Dr. Pollack signed a letter agreeing that he was unable to state within a reasonable degree of medical certainty that Boyd's right

hip complaints were the result of the work injury. The arbitration decision resolves the inconsistencies as follows:

> Dr. Pollack has given inconsistent statements. However, Exhibit 5, p. 52 is Dr. Pollack's own words in a letter he wrote to a nurse case manager. Exhibit C, p. 2 is defense counsel's words summarizing a phone conversation with the doctor. Dr. Pollack has not been shown to have changed his mind, or to have rescinded his earlier opinion. If he has changed his mind, he has not explained why. His earlier opinion states it is based on claimant's pain history, whereas the statement by defense counsel offers no basis for that conclusion. Greater weight will be given to Dr. Pollack's own words. Dr. Pollack concluded claimant's right hip pain was indeed caused by his feet being run over by the forklift, as evidenced by claimant's immediate reports of hip pain as well as foot and leg pain, and by claimant's ongoing reports of hip pain throughout his treatment. Thus, Dr. Pollack's original conclusion is corroborated by the other facts in this record.

The arbitration decision also cites Dr. Stoken's finding that Boyd's right hip pain was causally related to his work injury. Giving greater weight to Dr. Pollack and Dr. Stocken's opinions, the agency found Boyd suffered an industrial disability.

It is the role of the agency to determine the credibility of the witnesses and the weight to be given any evidence. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). The agency may accept or reject an expert opinion in whole *or* in part. *Id.* Here, the agency found the statement given by Dr. Pollack in his own words regarding Boyd's hip pain and the opinion of Dr. Stoken to be more credible than the other doctors who examined Boyd. The agency gave adequate reasons for its credibility determination. When giving Drs. Pollack and Stocken's opinions greater deference, we find there is sufficient evidence by which a neutral, detached, and reasonable person could find Boyd's right-hip injury is causally related to his crush injuries. Accordingly, we affirm the district court's

decision on judicial review, affirming the commissioner's finding Boyd suffered an injury to the body as a whole.

We next consider both parties' challenge of the agency's assignment of an eighty-percent industrial disability. Cadbury Schweppes argues the impairment rating is not supported by substantial evidence because the agency erred in making findings regarding Boyd's activity restrictions and his ability to obtain employment. It asks the award be reversed or remanded for redetermination. On cross-appeal, Boyd argues the evidence shows the award should be modified to an award of permanent total disability.

The district court agreed with Cadbury Schweppes that the agency erred in finding some of Boyd's physicians imposed activity restrictions on him. Our review shows only Dr. Stoken, who provided an independent medical examination, assigned Boyd any restrictions. However, the district court correctly noted that this error does not mean the agency's decision is not supported by substantial evidence. Industrial disability is based upon loss in earning capacity. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 673 (Iowa 2005). Loss of earning capacity is determined by comparing what the injured worker could earn before the injury and comparing it to what the same worker could earn after the injury. *Id.* The agency makes this determination by considering a number of factors: the employee's functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for

relocation in the job market. *Id.* Functional impairment is only one of the factors to be considered and is not solely determinative. *Id.*

The agency considered a number of factors in determining the extent of Boyd's impairment. It noted Boyd's use of a wheelchair, which—although self-imposed—proves to be necessary. It cited the vocational evaluation showing Boyd can only perform sedentary work when prior to his injury he performed physical labor. It noted Boyd's age and the vocational expert's conclusion that there are no jobs available to him in the current job market. The agency stated:

> His education is limited to high school and a few college courses, which further limits his job prospects. His work history has involved concrete work, painting, and carpentry jobs he is ill suited for now because of his work injury. He is able to drive a motor vehicle, but uses a wheelchair after he exits the vehicle. He is on Social Security disability. He has had to give up personal activities such as golfing and boating due to his injury. He can no longer do yard work, home repairs, or remodeling as he could before. He tried to climb a ladder and could not do even one step due to his foot pain. His feet are still swollen, requiring an increase of one shoe size. His wife has to help him put on his socks.

The agency also noted that Boyd had looked for and was unable to find part-time employment. However, noting that Boyd's treating physicians did not impose work restrictions, the agency declined to find Boyd was permanently totally disabled, noting he retains full use of his upper extremities and is able to do seated work.

We find the impairment rating assigned by the agency is supported by substantial evidence in the record and is not irrational, illogical, and wholly unjustifiable. Accordingly, we affirm the agency's decision.

AFFIRMED ON BOTH APPEALS.